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No. 01-1134

Supreme Court, U.S.
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In The
Supreme Court of the United States

WILLIAM D. MCCARTY, DAVID W. HADLEY, JUDITH G. RIPLEY, CAMIE J. SWANSON-HULL and DAVID W. ZIEGNER, in their official capacities as Commissioners of the Indiana Utility Regulatory Commission,

Petitioners,

v.

MIDWESTERN GAS TRANSMISSION COMPANY and SOUTHERN INDIANA GAS AND ELECTRIC COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The court of appeals has taken from the State of Indiana an important aspect of its sovereignty which *Younger*,[1] *NOPSI*,[2] Congress, and the Eleventh Amendment protect. This intrusion leaves Indiana powerless to evaluate and protect local interests vital to its citizens, land, and economy. The court of appeals has violated fundamental requirements of *Younger* and *NOPSI* to define a state's interests broadly, and to enjoin a state's determination of the constitutionality of its own statutes *only* when such laws are *conclusively* shown to be "flagrantly and patently" unconstitutional. Instead, and entirely without justification, the court of appeals characterized Indiana's interests as parochial and protectionist. The court also substituted presumption and appearance for the district court's careful and restrained analysis of the abstention question.

The conflicts with *Younger* and *NOPSI* are no less offensive to state sovereignty when a conflict has yet to develop on the underlying constitutional issue. As the district court correctly observed, the "issue presented" under *Younger* was "only whether the result" of the preemption "debate is so clear that any effort by the Indiana Commission to exercise jurisdiction . . . would be 'flagrantly and patently' unconstitutional." Pet. App. 59a. Contrary to the arguments of the several opponents to *certiorari*, the issue is not settled or resolved. The preemption question with respect to natural gas bypass deliveries has not been decided by this Court, by anything approaching a majority of the circuits, or by any state court of last resort. In fact, the result of the decision by the court of appeals is that *no* state court has the opportunity to address the issues of preemption.

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1 *Younger v. Harris*, 401 U.S. 37 (1971).

2 *New Orleans Pub. Serv. Inc. v. Council Of New Orleans*, 491 U.S. 350 (1989).

I. Indiana's Interests Cannot Be Extinguished By A FERC Permit Proceeding In Which It Neither Appeared Nor Participated.

A. Estoppel is not an exception to *Younger*.

Midwestern and its *amici* claim that the IURC enforcement proceedings were collaterally estopped by the FERC permit proceedings. This argument was correctly rejected by the district court, which found that the "short answer" is that the IURC "was not a party to the FERC proceeding" and therefore "is not bound by any conclusions FERC reached." Pet. App. 63a. The court of appeals similarly dismissed the point in the first moments of oral argument, given that Midwestern had abandoned the argument in its appellate brief (saying "maybe" the IURC is estopped, but the court "need not decide," Midwestern App. Br. 17-20). Seventh Circuit precedents also hold that an injunction will not be issued "when the plaintiff has an adequate remedy at law, which he does if he can assert the ground on which he seeks an injunction [here estoppel] as a defense to the very proceeding that the injunction would put a stop to." *Arkebauer v. Kiley*, 985 F.2d 1351, 1358 (7th Cir. 1993), quoting *W.C.M. Window Co. v. Bernardi*, 730 F.2d 486, 490 (7th Cir. 1984).

There is no merit in Midwestern's assertion that the Indiana Utility Consumer Counselor's ("UCC's") nominal appearance in the FERC proceedings somehow estops the IURC from enforcing Indiana law. Midwestern and the amici distort beyond recognition the Court's opinion in *Sunshine Anthracite Coal Co. v. Adams*, 310 U.S. 381, 403 (1940), which actually said the "crucial point is whether or not in the earlier litigation the representative" that participated, here the UCC, "had authority to represent" the interests of the IURC or the entire State of Indiana "in a final adjudication of the issue in controversy." The UCC was never given any such authority, and it would be error to presume otherwise. *See King v. Walters*, 190 F.3d 784, 790

(7th Cir. 1999) ("wrong to assume that estoppel principles applied" when record did not "reveal . . . the requisite actual authority"). The Indiana statute establishes the UCC as a public advocate *before* the IURC and the state departments of revenue and transportation; the UCC does not appear or function *on behalf of* the IURC and these departments. Ind. Code § 8-1-1. The UCC does not represent either the IURC or the entire State of Indiana.

Section 19(b) of the NGA, upon which Midwestern and its *amici* rely, is limited to *parties* to a FERC proceeding: "any party to a proceeding under this chapter aggrieved by an order issued by [FERC] may obtain review of such order in the Court of Appeals of the United States . . ." 15 U.S.C. § 717r(b). Neither the IURC nor the State of Indiana were parties in the FERC proceeding which the *certiorari* opponents now claim estops the IURC enforcement proceedings.[3]

Midwestern essentially argues for a federal injunction against the state itself. Under such a regime, no state court could decide the constitutionality of its own statute if a federal agency finds that statute preempted. *But see Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring) ("where a plaintiff seeks to divest the state of all regulatory power . . . it simply cannot be said that the suit is not a suit against the state"). Pursuant to Articles III and VI of the United States Constitution, the federal circuit courts of appeals and the state courts of last resort are "coordinate courts," equally subject to the "supervisory jurisdiction of the Supreme Court of the United States." *United States v. Woods*, 432 F.2d 1072, 1075 (7th Cir. 1970). Until the "Supreme Court has spoken, state courts are not precluded from exercising their own judgment upon questions of federal law." *Id.*; *see also Indiana Dep't of Public Welfare v. Payne*, 622 N.E.2d 461, 468

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3 Petitioners have found no decision by any court holding that a FERC ruling binds a state or state agency that has not elected to appear before FERC, and Midwestern cites none.

(Ind. 1993) ("lower federal court decisions . . . have non-binding authority on state courts"). The Constitution and its principles of federalism do not allow the subordinate federal courts, let alone FERC, to divest the states of their sovereign powers.

B. The fiction of a "completed" federal litigation.

The FERC proceedings here were not judicial in nature, but were routine permit proceedings that, but for SIGECO's intervention, would have been completed by automatic approval in as few as 45 days. The IURC did not intervene or participate in the FERC proceedings in any way.

The IURC's enforcement proceedings were initiated within a few weeks after Midwestern and its customers disclosed their agreement through the permit filings with FERC. (In such cases, FERC will virtually always receive the first filing given that the underlying agreement has been made between the pipeline company and the customer.) Midwestern actively participated for many months in the IURC proceedings -- including by seeking a legal ruling on the preemption issue -- only until it obtained the FERC permits it sought. That is when it changed course and filed its collateral federal lawsuit seeking an injunction against the ongoing IURC enforcement proceedings. The notion of a "completed" federal litigation here (Br.19-20) is fiction. Midwestern obtained FERC approval while the IURC's proceedings were underway, and sought federal injunctive protection from the completion of those enforcement proceedings.

C. A temporary stay, without voluntary submission to federal jurisdiction, does not waive state enforcement power.

The briefs opposing *certiorari* also wrongly argue that the IURC's temporary stay is somehow "dispositive of" the *Younger* issues, and mischaracterize the Seventh Circuit's opinion in *Time Warner Cable v. Doyle*, 66 F.3d 867 (7th Cir. 1994), as supporting this proposition. *See, e.g.*, INGAA Br. 6; GPC Br. 12. In *Time Warner*, the court noted that any waiver resulted from the state's *failure to argue abstention*, not from its temporary stay of the state proceedings. 66 F.3d at 874 n.6. Similarly, in other opinions, the Seventh Circuit has made clear that abstention may be waived only "affirmatively," such as by "expressly urging the district court to address the merits of the case." *See Int'l College of Surgeons v. City of Chicago*, 153 F.3d 356, 361 n.4 (7th Cir. 1998) (citing *Time Warner*); *see also Marcal Paper Mills, Inc. v. Ewing*, 790 F.2d 195, 197-98 (1st Cir. 1986) (affirming *Younger* abstention even though state court proceeding voluntarily stayed). The IURC has actively resisted federal intervention from the outset of this case. As Midwestern's counsel necessarily admitted to the district judge, the IURC is "prepared to go forward. . . . It has not let go [and is] attempting to enforce state law." SA 3-4.[4]

II. Indiana's Interests In Local Gas Delivery Services And Facilities Remain Vitally Important Regardless Of The Location Or Nature Of The Sale.

Midwestern (Br. 16-17) questions whether the State's interest is in the regulation of utilities generally, or in the regulation of the service of local distribution and the

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4 The temporary stay was entered at a time when the FERC proceedings might have mooted the issue (though they ultimately did not). That the IURC did not press forward while subsequently being sued in federal court -- and vigorously arguing for abstension -- is certainly no basis to question the State's interest in enforcing its laws.

facilities constructed for that purpose. The distinction is immaterial because Congress and this Court have recognized both as being vitally important to states. *See* Petition, 17-19.

Midwestern, like the court of appeals, also asserts that a state has no legitimate interest "where its actions clearly encroach upon an exclusive federal domain." Br. 18. This is not the standard required by *NOPSI*, and merely begs the question of whether Midwestern's local delivery service and facilities -- which are used solely to parcel out gas to individual customers within Indiana -- are in the state or federal "domain."

None of the *certiorari* opponents explain why a state's interest in local gas delivery service disappears when the sale occurs outside the state. Indiana's interests in the direct local delivery of natural gas to end-use consumers are no less real or vital whether the sale has occurred in Oklahoma or Indiana. The Court directly recognized this fact in *General Motors Corp. v. Tracy*, 519 U.S. 278, 305 (1997), when it said the circumstances -- including the states' interests -- in the new, unbundled market were "remarkably similar" to those it considered in *Panhandle Eastern Pipe Line Co. v. Michigan Pub. Serv. Comm'n*, 341 U.S. 329 (1951).

The state interests recognized by this Court in *Tracy* and *Panhandle* are no less present, vital, or urgent simply because the provision of service is unbundled and any sales are arranged or consummated in another state. None of the interests in public health and welfare, efficiency, and convenience have been obviated or diminished by the recent changes in the economies of the market. The merits and benefits of deregulation are not materially threatened by a continuing recognition of the states' vital interests, which have long been recognized by this Court and Congress.

III. Midwestern's Arguments Do Not Satisfy Any Recognized Exception To *Younger* Abstention.

A. No basis to claim the Commissioners have been harassing or vexatious.

Midwestern quotes frequently the court of appeals' gratuitous descriptions of SIGECO's referrals to the IURC as "harassing" or "vexatious." Of course, the court of appeals did not say that the IURC had taken any action that could be described as harassing or vexatious. The district court had reviewed early allegations of this kind and found "no evidence of harassment or bad faith on the part of SIGECO, let alone the Indiana Commissioners." Pet. App. 33a. Nor could any such allegation be made against the IURC, who indisputably are discharging their sworn duties to enforce Indiana law. *See* Ind. Code § 8-1-2-115 ("the commission *shall inquire*" into any "violation of the statutes of this state and "it *shall be its duty* to enforce" such statutes) (*emphasis added*).

B. The Court should not assume that the State will disfavor pipelines or ignore state laws requiring open access and reasonable rates by LDCs.

Midwestern builds a number of its arguments on the faulty premise that recognizing state regulatory power over local gas delivery services and facilities means a transfer of "monopoly power" to LDCs -- *i.e.*, the power to exclude pipeline companies from this business. *See, e.g.*, Br. 14, 28. However, the IURC is required by its enabling statute to make decisions in the *public* interest, not in the interest of the LDCs. Ind. Code § 8-1-2-87.5. If a pipeline's proposal for local delivery service best meets the interests of Indiana citizens and ratepayers, it will be approved. There is no basis to assume otherwise.

Similarly, to the extent LDCs continue to provide local delivery service to industrial consumers, the IURC consistently requires that these services be provided on an open-access basis and at reasonable, non-discriminatory rates. There is no basis to suggest that the IURC will defy Indiana law and the public interest of the State of Indiana by erecting discriminatory blockades against delivery to industrial consumers.

C. Federal preemption of the Indiana statutes is far from "flagrant" or "patent"; *New York v. FERC* does not address the question.

Respondent acknowledges that simply asserting preemption is insufficient to render preemption patent. Br. 17. But it does not suggest what standard must be met for sufficient flagrancy or patency; that is, when a federal court would not be second-guessing the issue to be litigated in state court. The logical answer is when either this Court or Congress has explicitly decided the question in such a manner that no reasonable judge could rule differently.[5]

No *state* appellate court, nor any authority that would bind a state court or agency, has decided the jurisdictional question. Midwestern initially asked the IURC to certify the question to the Indiana appellate courts, but then withdrew that request in order to pursue a federal injunction. The Court should be skeptical when the respondent and supporting *amici* require 70 pages to argue that a legal conclusion is so obvious and "clear" that Indiana courts should not be allowed even to consider it.

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5 Petitioners recognize that in other circumstances such difficult statutory construction would not be required -- for example, if a state's law purported to allow its regulators to order interstate pipeline curtailments or set transportation rates governing the transmission of gas by the pipeline to the LDC.

Skepticism is especially warranted when the respondent overstates that "every circuit has found [the preemption question] to be clear, beyond any doubt" and that all of those circuit court decisions "were affirmed by this Court[]." Br. 2. The fact is, only three circuit courts have addressed the issue, employing differing and even inconsistent reasoning. This Court has hardly affirmed such opinions when its only citation to them, in *General Motors Corp. v. Tracy*, expressly *declined* to pass upon their merit. The three circuit court opinions were not cited or mentioned in, let alone affirmed by, *New York v. FERC*, ___ U.S. ___, 122 S.Ct. 1012 (2002).

In fact, the Court emphasized in *New York v. FERC* that the questions presented did *not* involve the validity of a state law alleged to conflict with federal agency action, and that in such a case the state law is entitled to a "presumption against preemption." *Id.* at 1023. Thus, the Court stated that when, as here, a state law is alleged to be preempted, it "starts with the assumption that the historical police powers of the state" are "not to be superseded . . . unless that was the clear and manifest purpose of Congress." *Id.* Further, in the *New York* case FERC was *not* regulating an interstate provider's bypass of the local utility but certain local electric utilities' refusal to participate on reasonable terms as part of an interstate electric grid. *See also* SIGECO's Reply, Part II(B). Nothing in *New York v. FERC* makes preemption "patent" here or justifies the court of appeals' invasion of state sovereignty.

CONCLUSION

This Court should grant the petition for a writ of certiorari and halt the circuit courts' dilution of the requirements of *Younger* and *NOPSI* that sustain the fundamental principles of federalism and comity.

Respectfully submitted,
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